No. 17-21

In The Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE STATE OF ALASKA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim?

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INTERESTS OF AMICUS CURIAE STATE OF ALASKA

The State of Alaska protects its citizens and enforces its laws through its statewide law enforcement agency, the Alaska State Troopers. Over 300 troopers investigate crimes, patrol highways, and maintain public order in some of the smallest, most remote communities in the nation. Alaska has a paramount interest in ensuring that its officers are able to vigorously protect the public without the threat of harassing litigation from unfounded claims of First Amendment retaliation under 42 U.S.C. § 1983. The State also has a concrete financial interest in minimizing its troopers' exposure to liability because it indemnifies them for unfavorable judgments based on actions within the scope of their employment.

The State's interests are far from theoretical: the outcome of this case will directly impact a retaliatory-arrest claim pending against two Alaska troopers after a recent decision by the Ninth Circuit Court of Appeals, *Bartlett v. Nieves*, No. 16-35631, 2017 WL 4712440 (9th Cir. Oct. 20, 2017).[1] In that case, the Court of Appeals recognized the existence of probable cause to arrest the claimant for assault but

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[1] The troopers in that case, who are represented by state attorneys, will be filing a petition for a writ of certiorari to the Ninth Circuit on or before February 19, 2018. They will ask the Court to grant the petition and hold that case so it can be decided consistently with this case. The Ninth Circuit has stayed its mandate pending the filing of the petition for certiorari. *Bartlett*, No. 16-35631, Dkt. 47.

nonetheless reversed the district court's grant of summary judgment to the arresting officers. *Id.* at *1, 2. The State thus has an immediate interest in protecting these troopers from trial by establishing that the existence of probable cause to arrest forecloses a retaliatory-arrest claim.

SUMMARY OF ARGUMENT

A plaintiff asserting a claim of retaliatory arrest in violation of the First Amendment should be required to plead and prove that the arrest was not supported by probable cause. Without this rule, law enforcement officers are vulnerable to meritless retaliatory-arrest claims, "at a cost not only to the defendant officials, but to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Exposing officers to these difficult-to-defend suits both burdens them with the demands of increased litigation and threatens to deter them from making arrests that are supported by probable cause and important to protect public safety.

Fane Lozman's unique story obscures how a ruling in his favor would hinder law enforcement officers in routine community policing situations. A far more representative claim of retaliatory arrest is the Ninth Circuit's recent decision in *Bartlett v. Nieves*, No. 16-35631, 2017 WL 4712440 (9th Cir. Oct. 20, 2017), which plainly illustrates the problems of allowing these claims to proceed despite the existence of probable cause. The Ninth Circuit panel in *Bartlett* ruled that

troopers patrolling a Bacchanalian snowmobile racing festival in the Alaskan wilds had probable cause to arrest a man for assault, disorderly conduct, and harassment after he accosted them during an investigation. *Id.* at *2. But in the Ninth Circuit, the existence of probable cause for an arrest does not bar a claim that the arrest was retaliatory. *Id.* (citing *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013)). The officers now face trial on a dispute over their subjective intent, despite the objective reasonableness of arresting a drunk, belligerent man who seemed poised to assault them. *Id.*

The *Bartlett* decision shows how easily almost any routine arrest can boomerang into a First Amendment retaliation claim if the arrestee expresses irritation when confronted by police. It also shows how difficult it is to defeat even meritless claims of retaliatory arrest. And it shows the dilemma that police will face if this Court rules in Lozman's favor. When a person whom police reasonably believe has committed a crime engages in some kind of protected expression – even just an abusive tirade – officers will have to decide whether the public safety benefit of arresting him is worth the personal risk of being sued for retaliatory arrest. Ruling that a retaliatory-arrest claim is barred if the arrest was supported by probable cause will ensure that officers do not have to make that choice.

ARGUMENT

Evidence of probable cause is highly probative of the key issue in most retaliatory-arrest claims: whether retaliation against protected speech was the "but-for cause" of the arrest. *Hartman v. Moore*, 547 U.S. 250, 256, 265 (2006). Requiring a plaintiff to plead and prove that the arrest lacked probable cause thus effectively filters out meritless claims. *See id.* at 261 ("[E]stablishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive."). The Ninth Circuit's decision in *Bartlett v. Nieves*, No. 16-35631, 2017 WL 4712440 (9th Cir. Oct. 20, 2017), and other cases illustrate how, without this protection, police officers' vulnerability to meritless retaliatory-arrest claims undermines their ability to protect the public.

To prove a claim of First Amendment retaliation under 42 U.S.C. § 1983, a plaintiff must show that retaliation against his protected speech was the "but-for cause" of the official action against him. *Hartman*, 547 U.S. at 256 (citing *Crawford-El v. Britton*, 523 U.S. 574, 593 (1998); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). In *Hartman v. Moore*, the Court ruled that a plaintiff claiming that he was prosecuted in retaliation for his speech must plead and prove that there was no probable cause for the prosecution. 547 U.S. at 266-67. This rule is justified by the complexity of showing a causal connection between the alleged retaliatory motive and the prosecution, and by the "powerful evidentiary significance" of probable cause in proving that connection "in practically all

cases." *Id.* at 261, 265. Given the "close relationship" between claims of retaliatory prosecution and retaliatory arrest, these reasons apply with similar force to the latter. *See Reichle v. Howards*, 566 U.S. 658, 670 (2012). And as Respondent City of Riviera Beach explains, requiring plaintiffs to plead and prove lack of probable cause when making retaliatory-arrest claims is consistent with both the claim's common law antecedents and the Court's preference for objective tests in adjudicating constitutional torts.

Requiring plaintiffs asserting retaliatory-arrest claims to show lack of probable cause serves another salutary function: protecting police officers from unfounded claims. "Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El*, 523 U.S. at 584-85. These claims are also harder to defend against at trial. Although other § 1983 claims are usually resolved on the basis of extrinsic, verifiable evidence, retaliatory-arrest claims will often turn on the credibility of the officer's own testimony about his subjective intent. Not only will officers who act in good faith have difficulty avoiding trial, they will have far less confidence of being vindicated there.

These officers will get little protection from qualified immunity. Qualified immunity shields officers from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982). If the Court recognizes a right to be free from retaliatory arrest regardless of probable cause, then a plaintiff will be able to negate qualified immunity simply by alleging some fact suggesting retaliatory motive. So while the Court has stressed the importance of protecting government officials who act in good faith not only from monetary liability but also from the costs of being forced to stand trial, *id.* at 816 (warning of "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"), even police officers who act in good faith will not enjoy this protection when faced with retaliatory-arrest claims.

Requiring plaintiffs to plead and prove probable cause is thus an essential protection against unfounded retaliatory-arrest claims. Litigation in the Ninth Circuit, which has rejected this rule, *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013), illustrates precisely why the rule is needed to ensure police are not deterred from vigorously protecting public safety.

I. Retaliatory-arrest claims commonly arise out of everyday police encounters.

When weighing the costs and benefits of a probable-cause requirement, the Court should take into account the day-to-day circumstances that officers encounter and that commonly spur retaliatory-arrest claims against them. It is unusual to be arrested at a

city council meeting, and some of Lozman's hypothetical arrests are far-fetched indeed – it seems doubtful that someone has ever been subject to arrest, retaliatory or otherwise, for shallowly burying a diseased hamster. Pet. Br. 23. Retaliatory-arrest claims are much more likely to arise out of routine community policing encounters.

The *Bartlett* decision presents a far more typical scenario and illustrates the ease with which anyone who criticizes, insults, or protests officers can assert a colorable retaliatory-arrest claim. Russell Bartlett was arrested at Arctic Man, an extreme ski and snowmobile racing event in the remote Hoodoo Mountains of Alaska that features large crowds and abundant alcohol use. *Bartlett v. Nieves*, No. 4:15-cv-00004-SLG, 2016 WL 3702952, *1 (D. Alaska July 7, 2016), affirmed in part, reversed in part by *Bartlett v. Nieves*, 2017 WL 4712440 at *1. While investigating underage drinking at a party at 1:30 am, Alaska State Trooper Luis Nieves attempted to speak to Bartlett. *Bartlett*, 2016 WL 3702952 at *1. Bartlett declined to speak to Trooper Nieves, so Nieves left Bartlett and headed toward the trooper vehicle. Bartlett then marched up to Trooper Bruce Weight, who was interviewing a minor, and loudly challenged the Trooper's authority to speak with the young man. *Id.* The district court found that video recording of the incident showed "Trooper Weight, Mr. Bartlett, and the minor standing very close together exchanging words" and that "Bartlett's right hand was at roughly shoulder height within inches of

Trooper Weight's face."[2] *Id.* at *2. The 5'9", 240-pound Bartlett, who at the time of the incident was too intoxicated to drive, *Bartlett*, No. 16-35631, Dkt. 23 at 43, 46, later maintained that his close proximity to Trooper Weight and loud voice were appropriate given the volume of music at the party, but Trooper Weight viewed Bartlett's "escalating voice, his look of anger, [and] his body language" as "hostile" "pre-assault indicators." *Id.* Dkt. 8-1 at 92.

To create a safe space for himself, Trooper Weight placed his open palms on Bartlett's chest and pushed him back. *Bartlett*, 2016 WL 3702952 at *1; No. 16-35631, Dkt. 23 at 39. Trooper Nieves, believing that Bartlett posed a danger to Weight, ran to help, and both officers restrained and then arrested Bartlett. No. 16-35631, Dkt. 8-1 at 72-73. He was released a few hours later without injury. *Id.* Dkt. 23 at 42, 55. Bartlett was charged with disorderly conduct and resisting arrest. *Bartlett*, 2016 WL 3702952 at *3. The prosecution later dismissed the case, *id.* at *3, but the assigned prosecutor stated to the district court that he believed probable cause existed to charge Bartlett for disorderly conduct, resisting arrest, and assault. No. 16-35631 Dkt. 8-1 at 113.

Bartlett sued Troopers Weight and Nieves, asserting several claims under § 1983, including retaliatory arrest in violation of the First Amendment. The

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[2] The camera's view of Bartlett's hand was partially blocked, so the video does not show, and the parties dispute, whether Bartlett raised his hand to Weight's face before the Trooper pushed him back or after.

district court granted summary judgment in favor of the troopers on all claims, *Bartlett*, 2016 WL 3702952 at *4-12, and the Ninth Circuit affirmed on all claims except for retaliatory arrest, *Bartlett*, 2017 WL 4712440 at *1-2. The appellate court ruled that the troopers had probable cause to arrest Bartlett for assault, disorderly conduct, harassment, and resisting arrest. *Id.* Nevertheless, the court reiterated its earlier holding in *Ford v. City of Yakima* that probable cause for an arrest does not bar a plaintiff's claim that the arrest was retaliatory in violation of the First Amendment. *Id.* at *2 (citing *Ford*, 706 F.3d at 1196). The court found that a jury might be persuaded that Bartlett was arrested not for his harassing and belligerent conduct, but because of his earlier refusal to assist with the investigation. *Id.* The court's conclusion was based solely on Bartlett's uncorroborated claim that Trooper Nieves said after the arrest, "Bet you wish you would have talked to me earlier." The court thus ruled that summary judgment should not have been granted. *Id.*

The *Bartlett* case illustrates how almost any arrest can transform into a retaliatory-arrest claim – and promptly subject an officer to the burdens of litigation – if the suspect engages in some kind of expressive activity, even just personal insults. *See City of Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."). The *Bartlett* case is not an outlier. Other retaliatory-arrest claims in the Ninth Circuit have originated in arrests for

disorderly conduct, assault, traffic stops, and other situations requiring police to act quickly in the interest of public safety:

- A man ejected from a professional football game for intoxication and arrested after attempting to re-enter the stadium alleged that his arrest was in retaliation for identifying himself as an off-duty officer and asking police to "take it easy," *Holguin v. City of San Diego*, 135 F. Supp. 3d 1151, 1162-63 (S.D. Cal. 2015) (granting summary judgment in favor of officers on retaliation claim);

- A group arrested after an evening of drinking that culminated in a physical altercation with police officers who were escorting them from a comedy club that had ejected them alleged that they were arrested in retaliation for one man's statement to police that "even [his] father could kick their asses," *Engman v. City of Ontario*, No. ECDV 10-284 CAS (PLAx), 2011 WL 13134048, *1-2, 10 (C.D. Cal. May 23, 2011) (denying summary judgment on retaliation claim);

- A woman arrested for criminal trespass and resisting arrest when she refused to vacate her camp on government property after being served with a court order of ejectment alleged that her arrest was in retaliation for verbally challenging an officer's instructions to pack her belongings and leave, *Morgan v. County of Hawaii*,

No. CV 14-00551 SOM-BMK, 2016 WL 1254222, *5, 18-20 (D. Haw. Mar. 29, 2016) (awarding qualified immunity to defendants on retaliation claim);

- A man arrested after trying to operate a vehicle while visibly intoxicated alleged that his arrest was in retaliation for his complaints about the officer's actions, *Dell'Orto v. Stark*, 123 F. App'x 761, 762-63 (9th Cir. 2005) (reversing denial of officer's motion for summary judgment);

- A man arrested for assaulting a minor whom he had lured to his home by sending a text message from his daughter's phone alleged that he was arrested in retaliation for having previously complained to police about the minor's relationship with his daughter, *Smith v. City of Payson*, No. CIV 10-2650 PHX MEA, 2012 WL 12881975 (D. Ariz. 2012) (granting summary judgment in favor of officers), *aff'd*, 585 F. App'x 421 (9th Cir. 2014);

- A man whom officers subjected to a pat-down search after observing him reach under the seat of his car during a traffic stop alleged that the search was in retaliation for his cursing at officers and accusing them of "just f**king with [him]," *White v. County of San Bernardino*, 503 F. App'x 551 (9th Cir. 2013) (affirming summary judgment on retaliation claim).

As these cases show, the Court's ruling in this case will impact officers on the front lines of public safety in city streets, in remote villages, and at large public events. These officers frequently encounter intoxicated and verbally combative suspects, and they must make split-second decisions in volatile circumstances. Exposing officers to retaliation claims for arrests that were supported by probable cause risks eroding their willingness to make lawful arrests required to protect public safety.

II. Without a requirement to show that probable cause was lacking, weak retaliatory-arrest claims can easily survive summary judgment.

The crux of most retaliatory-arrest claims will be a dispute over whether the arrest was motivated by retaliatory animus. "Because an official's state of mind is easy to allege and hard to disprove," *Crawford-El*, 523 U.S. at 584-85 (internal quotation marks omitted), an officer cannot easily establish for summary judgment that an arrest was not retaliatory.

The *Bartlett* decision shows just how easy it is for weak retaliatory-arrest claims to survive summary judgment. The court reversed the grant of summary judgment based solely on Bartlett's uncorroborated assertion that Trooper Nieves said something suggesting retaliatory motive. *Bartlett*, 2017 WL 4712440 at *2. Thus in the Ninth Circuit, a doubtful allegation about an officer's subjective intent defeats summary

judgment – even though the existence of probable cause to arrest for a crime as serious as assault strongly suggests that retaliatory motive was not the "but-for" cause for the arrest. Again, the *Bartlett* decision is not an outlier. In a recent case, summary judgment was denied on a retaliatory-arrest claim even though the plaintiff was *convicted* of the crime he was arrested for, based solely on the plaintiff's disputed assertion that officers made statements indicating retaliatory motive. *Mihailovici v. Snyder*, No. 3:15-cv-01675 MO, 2017 WL 1508180, *5-6 (D. Or. Apr. 25, 2017). Without the need to show the challenged arrest lacked probable cause, plaintiffs can expose officers to the burdens of trial on even the weakest retaliatory-arrest claims.

Apparently aware of this problem, the Ninth Circuit has tried to temper its rejection of the probable-cause element in order to "protect[] government officials from the disruption caused by unfounded claims." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008). Because "[t]here is almost always a weak inference of retaliation whenever a plaintiff and a defendant have had previous negative interactions," the court has articulated a rule of thumb to guide the district courts: cases with "very strong evidence of probable cause and very weak evidence of a retaliatory motive" should ordinarily result in summary judgment. *Id.* (cited in *Maidhof v. Celaya*, 641 F. App'x 734, 735 (9th Cir. 2016); *White*, 503 F. App'x at 553).

But that approach offers inadequate protection against meritless claims. The imprecise weighing it

requires will necessarily reflect the diverse perspectives of individual judges about what evidence of probable cause counts as "very strong," what evidence of retaliatory motive counts as "very weak," and how to balance those categories of evidence against one another. *E.g.*, *compare Maidhof*, 641 F. App'x at 736-37 (affirming summary judgment because there was probable cause for arrest and "evidence of retaliatory intent is weak"), *with id.* at 737 (Rawlinson, J., dissenting) (finding sufficient "circumstantial evidence of retaliation" to preclude summary judgment); *compare White*, 503 F. App'x at 553 (affirming summary judgment because evidence of retaliatory motive for pat-down search was "weak"), *with id.* at 555 (Graber, J., dissenting) (maintaining there was sufficient evidence for fact-finder to conclude that pat-down search was motivated by plaintiff's insult). The standard invites inconsistent results, and thus provides only scattershot protection against unfounded claims. Nor is it an effective screen for claims by unscrupulous plaintiffs, who can defeat summary judgment by claiming the officer made a damning statement, with no need to corroborate it.

In fact, relieving plaintiffs from the need to show lack of probable cause makes retaliatory-arrest claims uniquely easy to assert compared to other section 1983 claims against law enforcement. Probable cause is an absolute bar to Fourth Amendment claims of false arrest, regardless of the arresting officer's motivation, *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), and an absolute bar to claims of retaliatory prosecution as

well, *Hartman*, 547 U.S. at 265-66. And although probable cause does not bar claims of discriminatory arrest in violation of the Fourteenth Amendment, these claims require a "demanding" objective showing: at least some evidence that similarly situated people of another class were treated differently. *See United States v. Armstrong*, 517 U.S. 456, 465, 469 (1996) (holding that claimant asserting discriminatory prosecution "must show that similarly situated individuals of a different race were not prosecuted"); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533-34 (6th Cir. 2002) (extending *Armstrong* rule to law enforcement actions generally); *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (applying *Armstrong* rule to claim of discriminatory stops, detentions, and searches); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) (analyzing discriminatory arrest claim under *Armstrong* framework); *Richards v. City of Los Angeles*, 261 F. App'x 63, 65-66 (9th Cir. 2007) (characterizing claims of discriminatory inspections, raids, and arrests as "selective enforcement" claim requiring plaintiff to show similarly situated class). The need to show unequal treatment of similarly situated persons makes it hard to allege, and easy to disprove, unfounded claims of discriminatory arrest.

Not so for claims of retaliatory arrest. The ease of asserting these claims, and the difficulty of defending against them, justifies a rule that the plaintiff must plead and prove the absence of probable cause for the arrest.

III. Exposing officers to meritless retaliatory-arrest claims risks undercutting their performance and undermining public safety.

Police officers working a beat should not hesitate when forced to make quick decisions about how to protect the public and themselves. But permitting retaliatory-arrest claims to proceed even though the challenged arrest was supported by probable cause will place officers in the difficult position of weighing public safety against the risk of personal liability.

The *Bartlett* case again offers a useful illustration of this dilemma. Troopers Nieves and Weight were attempting to investigate underage drinking at a remote outdoor festival when they encountered Bartlett. *Bartlett*, 2016 WL 3702952 at *1. Bartlett not only interfered with their investigation; he also appeared intoxicated and aggressive. No. 16-35631, Dkt. 8-1 at 92, Dkt. 23 at 43. Because his conduct did not amount to a major crime, the troopers could have used their discretion not to arrest. And had they known that arresting him would spiral into a trial on a retaliatory-arrest claim, they might have declined to do so. Yet that would have meant leaving a drunk, belligerent man at a remote outdoor party with minors in the middle of the night. That is not the kind of decision that society or the courts should encourage officers to make. If the Court rules that probable cause does not bar retaliatory-arrest claims, this dilemma is likely to arise in countless routine encounters involving disorderly conduct, trespass, or other minor offenses that sometimes pose a danger to public safety.

When it decided *Hartman*, the Court did not consider the volume of retaliatory-prosecution litigation overwhelming. *Hartman*, 547 U.S. at 259. But retaliatory-arrest claims are a different story. In the twenty-five years preceding *Hartman*, the Court found fewer than two dozen damages actions for retaliatory prosecution that had come before all the courts of appeals. In contrast, more retaliatory-arrest claims have come before the Ninth Circuit alone in just the eleven years since *Hartman* was decided. *Bartlett*, 2017 WL 4712440 at *1; *Vohra v. City of Placentia*, 683 F. App'x 564, 567 (9th Cir. 2017); *Reed v. Lieurance*, 863 F.3d 1196, 1212 (9th Cir. 2017) (issuance of misdemeanor citation without arrest); *Sharp v. County of Orange*, 871 F.3d 901, 919 (9th Cir. 2017); *Maidhof*, 641 F. App'x at 735; *Picray v. Duffitt*, 652 F. App'x 497, 498 (9th Cir. 2016); *Willes v. Linn County*, 650 F. App'x 444, 444 (9th Cir. 2016); *Nichols v. City of Portland*, 622 F. App'x 679, 679 (9th Cir. 2015); *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013); *Gutierrez v. County of Los Angeles*, 545 F. App'x 701, 701 (9th Cir. 2013); *Jackson v. City of Pittsburg*, 518 F. App'x 518, 520-21 (9th Cir. 2013); *Martin v. Naval Criminal Investigative Serv.*, 539 F. App'x 830, 831 (9th Cir. 2013); *Ford*, 706 F.3d at 1190; *Tarahoui v. Brown*, 539 F. App'x 734, 734 (9th Cir. 2013); *White*, 503 F. App'x at 553; *Blomquist v. Town of Marana*, 501 F. App'x 657, 659 (9th Cir. 2012); *Lacey v. Maricopa County*, 693 F.3d 896, 916-17 (9th Cir. 2012) (en banc); *Dirks v. Grasso*, 449 F. App'x 589, 592 (9th Cir. 2011); *Glair v. City of Los Angeles*, 437 F. App'x 581, 581 (9th Cir. 2011); *Ikei v. City and County of Honolulu*,

441 F. App'x 493, 494 (9th Cir. 2011); *Wilson v. City of San Diego*, 462 F. App'x 683, 683 (9th Cir. 2011); *Kubanyi v. Covey*, 391 F. App'x 620, 621 (9th Cir. 2010); *Ra El v. Crain*, 399 F. App'x 180, 182 (9th Cir. 2010); *Beck v. City of Upland*, 527 F.3d 853, 868-69 (9th Cir. 2008); *Dietrich*, 548 F.3d at 901; *Scallion v. City of Hawthorne*, 280 F. App'x 671, 673 (9th Cir. 2008); *Tarr v. Maricopa County*, 256 F. App'x 71, 73-74 (9th Cir. 2007); *Skoog v. County of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006).

The threat to police officers from unfounded retaliatory-arrest claims is real. To avoid deterring officers from making objectively reasonable arrests that protect public safety, the Court should rule that a plaintiff asserting such a claim must show that the arrest lacked probable cause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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